CHUNG KHIAW BANK LTD. v. TAY SOO TONG; UNITED OVERSEAS BANK LTD. — APPLICANTS

[O.C.J. (Winslow J.) March 20, 1968]

[Singapore — Summons-in-Chambers No. 2393 of 1967 in Originating Summons No. 239 of 1966]

Practice and Procedure — Judgment by default — Setting aside — Applicant not party to action — Rule in Jacques v. *Harrison* (1) *— R.S.C., 1934, O. XXVIII r. 15.*

Practice and Procedure — Judgment by default — Originating summons — Setting aside — Ex parte order — Person affected — R.S.C., 1934, O. LIII r. 4(1).

Practice and Procedure — Judgment affecting right of person not party to action — When O. XVI r. 37 may be invoked.

The plaintiffs, by way of an originating summons, asked for and obtained in default of appearance of the defendant, an order of court declaring that they were the mortgagees of certain properties alleged to be owned by the defendant. However, the United Overseas Bank Ltd., the present applicants had earlier attached these properties for the purpose of satisfying a judgment which they had obtained against the same defendant. They consequently applied by way of summons-in-chambers to have the order of court made in default of the defendant's appearance set aside under O. XXVIII r. 15 and O. LIII r. 4(1). The application was resisted by the plaintiffs on the ground that as the applicants were not parties to the originating summons they had no *locus standi* and should obtain the leave of court before they could intervene in the matter.

Held, dismissing the application: (1) a person who is not a party to an action but who has been injuriously affected by a judgment which the defendant has allowed to go by default, may apply for leave under O. XXVIII r. 15 to set aside the judgment. However, according to the principle laid down in *Jacques* v. *Harrison,*(1) the application must be made either in the name of the defendant, or in the applicant's own name, in which case, the summons must be served on both the plaintiffs and the defendant;

(2) O. LIII r. 4(1) may be invoked to set aside an order of court only when the order was made *ex parte,* and the application made by a person affected by it. An order made in an originating summons to which a defendant is required to appear but fails to do so, is not an *ex parte* order within the meaning of O. LIII r. 4(1). Moreover, a person cannot be said to be affected by an order merely because it prevents him from attaching the interest of the party against whom the order was made.

(3) the applicants could not intervene under O. XVI r. 37 in order to set aside the order of court as they did not fall within the limited category of persons protected by that rule.

Case referred to:—

(1) *Jacques* v. *Harrison* (1884), 12 Q.B.D. 165.

SUMMONS-IN-CHAMBERS.

David T. See (*Francis Teoh Ong Cheh* with him) for the plaintiffs.

K. S. Chung for the applicants.

Cur. Adv. Vult.

Winslow J.: Persons who have observed the law in action in the courts, particularly in strongly contested cases involving legal arguments between counsel, may be reminded of what they may have seen happening in a boxing ring, the principal difference being that instead of a referee who runs the risk of being buffeted and bruised by the contestants, there is a judge who is in a perhaps more fortunate position unless he chooses to descend into the arena, which, I understand, is not a very good thing. Persons who may have listened to the arguments during the last 2 days may have, at first, been impressed by the arguments of the counsel for the plaintiffs, and then subsequently been impressed by the arguments of counsel for the applicants and so on. And perhaps they may have been left bewildered at the end of the case as to which way the decision would go. Fortunately, just as there are rules governing the conduct of a boxing match, or for that matter most other games, we in the courts are also accustomed to apply certain well-defined rules, departure from which sometimes results in a knock-out blow for one side or the other when least expected.

It is against this background of a strong contest between counsel for the plaintiffs and the applicants to whose application preliminary objections were raised by Mr. David See for the plaintiffs that I have the difficult task of deciding in the light of the rules which apply whether the applicants have succeeded through their counsel in meeting the said objections successfully.

Very briefly, the applicants were the successful plaintiffs in Suit No. 2180 of 1965 which they brought against the defendant, Tay Soo Tong trading as Tiong Bie Hang in which they obtained a judgment for $378,267.31. They then took out a writ of seizure and sale and an order of attachment which was registered against certain properties said to be owned by the defendant on October 27, 1966.

On September 22, 1966 however, originating summons No. 239 of 1966 was taken out by the plaintiffs in the present case, Chung Khiaw Bank Ltd., against the same defendant, Tay Soo Tong trading as Tiong Bie Hang. That originating summons was not heard till November 14, 1966 when an order was obtained in chambers for a declaration that they were the legal mortgagees of the self-same properties alleged to be owned by the defendant with liberty to sell the same. That order was obtained in default of the appearance of the defendant against whom a previous order for substituted service had already been obtained.

The present summons-in-chambers No. 239 of 1966 has been brought by the applicants with a view to making the Sheriff of Singapore a party to these proceedings and to having the order of court of November 14, 1966 made in the originating summons No. 239 of 1966 set aside and for other consequential orders.

This application was set down for hearing before me in open court and 4 days were allotted for this purpose. It should be noted that the order of court of November 14, 1966 was made in chambers by Chua J.

Mr. David See for the plaintiffs, Chung Khiaw Bank Ltd., raised preliminary objections to the application before me on various grounds which may be summarised as follows:—

(i) that the applicants were total strangers to the originating summons in question and accordingly were not parties to it and should therefore obtain the leave of the court if they intended to intervene;

(ii) that the applicants have no *locus standi* in the matter at all and should apply for leave to intervene on the principles laid down in *Jacques* v. *Harrison* [1] as to the modes open by which a stranger to an action who is injuriously affected through any judgment suffered by a defendant by default can set a judgment aside;

(iii) that the grounds for setting aside the order of court in question have not been set out in the summons itself as required by O. LXIII r. 3.

Mr. Chung for the applicants in reply to these objections dealt with these objections but claimed that the court should assume that the applicant had *locus standi* because they were persons injuriously affected. He also claimed that he was not attacking the order of court in question for irregularity and that therefore the principles laid down in *Jacques* v. *Harrison* [1] did not apply. Reliance was placed not only on O. XXVIII r. 15 but also on O. LIII r. 4(1). These rules read as follows:—

"Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit; and where an action has been set down on motion for judgment under rule 11, such setting down may be dealt with by the court or a judge in the same way as if judgment by default had been signed when the case was set down".

"Any order made *ex parte* may be varied or set aside on application, by any person affected by it, to a judge, on such terms as to costs or otherwise as to the judge seem fit".

It should be observed that in the case of O. XXVIII r. 15 Bowen L.J. in *Jacques* v. *Harrison* [1] made it clear that a person who is injuriously affected by a judgment suffered by a defendant by default should either apply to have the judgment set aside after having obtained the defendant's permission to use his name or take out a summons in his own name, but in that case served on both the plaintiffs and the defendant, applying for leave to have the judgment set aside and to be allowed either to defend the action on such terms of indemnifying the defendant as the judge may consider right or at all events to be at liberty to intervene in the action.

Mr. Chung said that he was not claiming to set aside the order of court on the grounds of any irregularity and that therefore he was not applying for leave to defend the action either in the names of the defendant or in the name of the applicants because that was not his intention at all. In short, he almost seemed to abandon any claim to be proceeding under O. XXVIII r. 15.

He was more concerned with setting aside the order of court under O. LIII r. 4(1) on the grounds that the applicants were persons who had been affected by the order and had not been served as they should have been and that such failure vitiated the order made. He said that the order was an *ex parte* one even though the originating summons in which that order was made did not commence as an *ex parte* application. He referred to O. LI r. 16 in relation to the hearing of summonses in chambers generally which provides that where any party, who has been duly served, fails to attend at the time appointed for the hearing, the judge may proceed *ex parte*. I disagree with this contention that an order made on an originating summons served on the defendant, albeit by substituted service, to which he fails to enter an appearance must be regarded as an *ex parte* order within the meaning of O. LIII r. 4(1). An order made in an originating summons to which a defendant or other respondent is required to enter an appearance which he fails to do is an order in default of appearance which is governed by O. XIII r. 14 and I do not think that it can be regarded as an *ex parte* order under O. LIII r. 4(1) merely because of the provisions of O. LI r. 16.

It is interesting to observe that whereas O. LIII r. 4(1) itself refers to variation or setting aside on an application by any person affected by it, the marginal note refers to applications by parties affected. Furthermore, in my view, the applicants are not persons affected by the order of court concerned in the sense that they were necessary parties to it because they suffered no injury directly under it. All that has happened is that they are unable to attach the interest of the defendant in the immovable properties in question to satisfy the judgment they have obtained against him. There may be some other remedy available to them but not in the form in which this application has been made.

Finally, I would refer to O. XVI r. 37 which may have some relevance. This rule reads as follows:—

"Where in any action for the administration of the estate of a deceased person, or the execution of the trusts of any deed or instrument, or for the partition or sale of any immovable property, a judgment or an order has been pronounced or made:—

(a) under Order XV;

(b) under Order XXXII;

(c) affecting the rights or interests of persons not parties to the action,

the court or a judge may direct that any persons interested in the estate or under the trust or in the immovable property shall be served with notice of the judgment or order.

(2) After such notice such persons shall be bound by the proceedings in the same manner as if they had originally been made parties, and may attend the proceedings under the judgment or order.

(3) Any person so served may, within one month after such service, apply to the court or judge to discharge, vary, or add to the judgment or order".

It does not seem that this rule will be of much assistance having regard to the fact that persons who are not parties to the action whose rights or interests may be affected are limited to those set out in O. XVI rr. 8, 29, 30, 31, 32, 33, 35, 42 and 43 according to the note on page 201 of *Mallal's* Supreme Court Practice (Volume I) into none of which categories the applicants fall.

I am therefore of the opinion that the preliminary objections to the application succeed. The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *R. C. H. Lim & Co.; Chung & Co.*

AIK HOE & CO. LTD. v. SUPERINTENDENT OF LANDS & SURVEYS, FIRST DIVISION

[P.C. (Viscount Dilhorne, Lord Guest, Lord Wilberforce, Lord Pearson & Sir Alan Taylor) March 21, 1968]

[Privy Council Appeal No. 18 of 1966]

Land Law — Acquisition of land for public purposes — Compensation — Matters to be considered in determining — Land Code (Sarawak Cap. 81) s. 60(1)(a).

Practice and Procedure — Privy Council — Appeal to — Practice of Board relating to land acquisition appeals — No interference except on question of law or principle.

This was an appeal from an order of the Federal Court ([1966] 1 M.L.J. 243) reducing the compensation for the acquisition of certain lands in Sarawak, awarded to the appellant by the High Court of Borneo. The appellant was the registered proprietor of two parcels of land which were compulsorily acquired by the Sarawak Government for public purposes. An award at the rate of $5,500 per acre was made by the respondent as compensation. The appellant applied to the High Court claiming that the award was insufficient. The trial judge and assessors, having accepted the evidence of a qualified valuer, reassessed the value of the land at $13,900 per acre. The Federal Court on an appeal by the respondent reduced the sum to $8,000 per acre for one lot, and $9,000 per acre for the other.

Held, dismissing the appeal: the practice of the Board in appeals relating to the acquisition of land is not to interfere with the decisions of the local courts founded on local knowledge and experience unless there appears to be an error of law or miscarriage of justice. The objections made by the Federal Court against the sum awarded by the High Court were valid. The appellant had not succeeded in showing that the Federal Court was wrong in principle. There was, therefore, no sufficient justification for the Board to interfere with the assessment made by the Federal Court.

Cases referred to:—

(1) *Assistant Development Officer* v. *Tayaballi*, A.I.R. 1933 Bom. 361 at p. 364.

(2) *Nowroji Rustomji Wadia* v. *Bombay Government*, L.R. 52 I.A. 367; 30 C.W.N. 386; A.I.R. 1925 P.C. 211.

(3) *Secretary of State for India* v. *General Steam Navigation Co.* (1909), L.R. 36 I.A. 200.

(4) *Rangoon Botatoung Co.* v. *The Collector Rangoon* (1912), L.R. 39 I.A. 197.

(5) *Charan Das* v. *Amir Khan* (1920), L.R. 47 I.A. 255.

(6) *Narsingh Das* v. *Secretary of State for India* (1924), L.R. 52 I.A. 133.

(7) *Vyricherla Narayana Gajapatiraju* v. *The Revenue Divisional Officer Vizagapatam* [1939] A.C. 302 at p. 313.

(8) *Maori Trustee* v. *Ministry of Works* [1959] A.C. 1 at p. 16.

PRIVY COUNCIL.

David Widdecombe, Q.C. and *G. Starforth Hill* for the appellant.

Peter Mooney and *John Vinelott* for the respondent.

Lord Wilberforce (delivering the judgment of the Board): This is an appeal from an order of the Federal Court of Malaysia which reduced the amount awarded to the appellant by the High Court of Borneo as compensation for the resumption of certain lands in Sarawak.

On 1st April 1960, which is the relevant date for assessing the value of the lands, the appellant was the registered proprietor under long leases of two parcels of land in the area of Kuching, in Sarawak. These are numbered K.O.T. 16178 and K.O.T. 16179 and are respectively 25.72 acres and 17.82 acres in extent. These lots are situated 4 miles from Kuching, a town, at the material time, having a population of some 50,000 inhabitants: they had been brought within the municipality of Kuching on 1st January 1960. Apart from some minor improvements on Lots 16178 they were undeveloped and without water or electricity: they were within a mixed zone area and so could be held by non-indigenous proprietors.

As regards their physical characteristics it is relevant to state that they both had extensive frontages to the Pending road, one lying on the north and the other on the south. They were both somewhat low-lying, and so, in certain possible events, exposed to the risk of flooding. Lot 16178 is, except for about 1 acre, below the 10 foot contour line: Lot 16179 is as to above one-half of its area below that line. To be above normal flood level it has been assumed that it is necessary to be at least 9 feet in height, and one of the factors affecting value is the cost of filing the land up to that height. Lot 16179 has upon it two grave plots affecting 1.1 acres. An area of 0.16 acre is similarly affected on Lot 16178.

The lands were required by the Government in connection with the projected new port of Kuching. It is common ground that its intended